Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1725

MONTGOMERY COUNTY COMMUNITY ACTION AGENCY,

Petitioner,

v.

JAMES W. POWERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

I. OPINIONS BELOW

All orders and opinions referred to herein are unreported, but are all printed in the Appendix to this Petition. The orders and opinions printed in the Appendix to this Petition are as follows:

Order of the Supreme Court of the State of Ohio, dated March 5, 1976;

Judgment Entry of the Court of Appeals of Montgomery County, Ohio, dated November 7, 1975;

Opinion of the Court of Appeals of Montgomery County, Ohio, dated November 1, 1975;

Judgment Entry of the Common Pleas Court of Montgomery County, Ohio, dated January 27, 1975;

Order of the Common Pleas Court of Montgomery County, Ohio, dated January 9, 1975.

II. JURISDICTION

The order of the Supreme Court of the State of Ohio was made and entered on March 5, 1976 (page 1a of Appendix). This order overruled Petitioner's motion to certify the Opinion (page 5a of Appendix) and judgment entry (page 3a of Appendix) of the Court of Appeals of Montgomery County, Ohio.

This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

III. QUESTIONS PRESENTED

A. Are federally funded community action agencies instrumentalities of the United States of America and its agencies and therefore immune from tort suits sounding in libel and slander?

B. Do state trial courts have jurisdiction over tort suits filed against the United States of America or its instrumentalities?

IV. STATUTES INVOLVED

The Economic Opportunity Act of 1964 provides in pertinent part:

42 U.S.C. 2790 (a):

> (a) A community action agency shall be a State or political subdivision of a State (having elected or duly appointed governing officials), or a combination of

> such political subdivisions, or a public or private nonprofit agency or organization which has been designated by a State or such a political subdivision or combination of such subdivisions, which—
>
> (1) has the power and authority and will perform the functions set forth in section 2795 of this title, including the power to enter into contracts with public and private nonprofit agencies and organizations to assist in fulfilling the purposes of this subchapter, and
>
> (2) is determined to be capable of planning, conducting, administering and evaluating a community action program and is currently designated as a community action agency by the Director.

A community action program is a community based and operated program —

> (1) which includes or is designed to include a sufficient number of projects or components to provide, in sum, a range of services and activities having a measurable and potentially major impact on causes of poverty in the community or those areas of the community where poverty is a particularly acute problem;
>
> (2) which has been developed, and which organizes and combines its component projects and activities, in a manner appropriate to carry out all the purposes of this subchapter; and
>
> (3) which conforms to such other supplementary criteria as the Director may prescribe consistent with the purposes and provisions of this subchapter.

The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. 1346 (b):

> (b) Subject to the provisions of chapter 171 of this

title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2671:

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

V. STATEMENT OF THE CASE

JAMES W. POWERS, as Plaintiff, filed this action, against THE MONTGOMERY COUNTY COMMUNITY ACTION AGENCY, ("Agency") on June 28, 1974

for money damages in the Common Pleas Court of Montgomery County, Ohio. Plaintiff had been the Controller of the Agency before he was terminated from that position. Plaintiff's claims in his First Amended Complaint related to his termination as Controller, and to events occurring subsequent to his termination. Plaintiff made three Claims for Relief against the Defendant:

1. First Claim for Relief – Breach of contract for summary dismissal, $75,000 damages claimed.
2. Second Claim for Relief – Fraudulent misrepresentations arising out of contract, $10,000 compensatory damages claimed; $50,000 punitive damages claimed.
3. Third Claim for Relief – Libel and slander, $100,000 compensatory damages claimed; $50,000 punitive damages claimed.

In its Answer to Plaintiff's First Amended Complaint, the Agency set up the following as its Second Defense:

> "The Complaint filed herein is barred by the doctrine of governmental immunity and/or charitable immunity."

The Agency filed for summary judgment as to Plaintiff's Third Claim for Relief, for the reason that the Claim sounded in tort and was barred by the doctrines of federal and state governmental immunity. Thus, at this early stage in the proceedings, the federal question of governmental immunity was brought before the trial court for final resolution. The trial court overruled Defendant's Motion for Summary Judgment on January 9, 1975, and the case proceeded to trial.

On January 13, 1975, the case was tried before a jury. At the close of all of the evidence, the trial court sustained the Agency's Motion for a directed verdict as to Plaintiff's

Second Claim, fraudulent misrepresentation arising out of contract. The First and Third Claims were submitted to the jury. The jury did not consider the governmental immunity defense, as that defense was one for the Court's decision. On January 17, 1975, the jury returned a $5,000 verdict as to Plaintiff's First Claim and a $15,000 verdict as to Plaintiff's Third Claim. A judgment entry reflecting the various verdicts was filed on January 27, 1975.

On February 5, 1975, the Agency filed a Motion for judgment notwithstanding the verdict, or in the alternative for a new trial. The issue of federal governmental immunity was again raised by the Agency. The trial court overruled the Motion on February 14, 1975. From that ruling, and the January 27, 1975 Judgment Entry, the Agency filed its appeal to the Court of Appeals for Montgomery County, Ohio on February 28, 1975. Again, the defense of federal governmental immunity was raised by the Agency. On November 1, 1975, the Court of Appeals overruled the Agency's Assignments of Error, and their opinion was journalized by Entry on November 7, 1975. Notice of appeal was filed to the Supreme Court of the State of Ohio on December 4, 1975. In its Memorandum in Support of Jurisdiction, filed with the Ohio Supreme Court, the Agency raised the issue of whether the trial court had subject matter jurisdiction over the tort claim, since the claim was one against an instrumentality of the United States of America. The issue of federal governmental immunity was also raised by the Agency.

On March 5, 1976, the Supreme Court of the State of Ohio overruled the Agency's Motion to Certify, and it is from that Entry that a Petition for Writ of Certiorari to the Supreme Court of the State of Ohio is filed herein.

VI. REASONS FOR GRANTING THE WRIT

A. FEDERALLY FUNDED COMMUNITY ACTION AGENCIES AS INSTRUMENTALTIES OF THE UNITED STATES OF AMERICA ARE IMMUNE FROM TORT SUITS SOUNDING IN LIBEL AND SLANDER.

To deny that the Montgomery County Community Action Agency is an instrumentality of the federal government and therefore entitled to the governmental immunity defense, is to recognize form over substance, and to ignore reality. The Supreme Court of the State of Ohio has opted for form, and completely ignored the Ohio precedent set in *Orleans* v. *United States,* 509 F.2d 197 (6th Cir., 1975), now pending decision before this Court (*United States* v. *Orleans,* certiorari granted on October 29, 1975, Case No. 75-328). The legal question presented in *Orleans* is the alter ego of the question presented in this petition: if community action agencies are instrumentalities of the United States, then they are entitled to the defense of governmental immunity if a suit is filed in state court.

In this petition, we will address the facts of this case as presented during the trial, review the statutory background of the Agency, and analyze relevant existing case law.

FACTS OF THE CASE

The Montgomery County Community Action Agency is an Ohio corporation, not-for-profit. Its purpose is to carry out a war against poverty and in carrying out this purpose, it conducts many antipoverty programs in Montgomery County, Ohio. For example, it provides legal services to low income families. It assists in child development

programs through the Head Start Program. It provides services in consumer affairs, in housing and welfare services, credit union services, and assists in the Vietnam Veterans Program. It also conducts a senior citizens nutrition program, wherein senior citizens are transported to the downtown YMCA and given free meals.

These programs, as well as the corporate purposes of the Agency, are an outgrowth of Title II of the Economic Opportunity Act of 1964, 78 Stat. 516, as amended, 42 U.S.C. 2781, et seq. Under the terms of that Act, eighty percent of the Agency's budget stems from the federal government, through the Office of Economic Opportunity (OEO). The remaining twenty percent comes from state and local governments, either in cash or in kind. The expenditure of these budgeted funds is subject to OEO guidelines and restrictions. OEO can disallow expenditures if they do not fall within the proper guidelines. For example, the Agency cannot spend any funds for funerals.

In addition to the restrictions on where money can be spent, OEO also requires that an independent audit be performed on the financial records of the Agency. The audit is twofold in nature — it covers not only the traditional financial statement audit, but also includes a compliance audit, in which the independent auditors issue a statement as to whether or not the Agency has complied with OEO expenditure regulations.

JAMES W. POWERS ("Powers") was Controller for the Agency from October 4, 1973 until March 27, 1974. He was fired from his job by Melvin J. Jackson, the Executive Director of the Agency. After Powers was fired, there were a number of news articles relating to his termination in the *Dayton Daily News* and *Dayton Journal Herald* newspapers. In those articles, Powers claimed he was being made a "scapegoat" for a critical audit, which

was being made of the Agency's financial records by the accounting firm of Alexander Grant and Company. These articles also quoted Melvin Jackson as having said that Powers was "incompetent" in his job. Those articles were the basis for Powers' libel and slander claims against the Agency.

Powers sued the Agency for breach of contract and for libel and slander. The Agency defended the breach of contract claim on the basis that there was "just cause" for firing Powers. As for the libel and slander claim, the Agency defended the claim on two bases: the claim was barred by the doctrine of governmental immunity, for the Agency was an instrumentality of the federal government; and, if any defamatory statements were made, they were in fact true.

STATUTORY BACKGROUND OF THE AGENCY

The Agency is organized as a not-for-profit corporation under the laws of the State of Ohio. Yet, it is so organized only by grace of the federal legislation which established community action agencies. 42 U.S.C. 2790 (a) specifically provides that:

> "A Community Action Agency *shall be* a state or political subdivision of a state (having elected or duly appointed governing officials), or a combination of such political subdivisions, or a public or private non-profit agency or organization which has been designated by a state or such political subdivision or combination of such subdivisions . . ." (emphasis added)

Under 42 U.S.C. 2790, there are several forms of organization available to community action agencies: public agencies, political subdivisions of states, etc. Regardless of the form of organization selected, a community action

agency would still be an instrumentality of the federal government. As such, a community action agency would clearly be entitled to an immunity defense in tort actions brought in state courts. The doctrine of federal supremacy requires that local law must yield to federal law, and the Agency, cloaked with the attributes of a sovereign, is immune from suits sounding in tort. As to federal agencies' immunity in tort actions, see *Barr* v. *Matteo,* 360 U.S. 564 (1959); *Gregorie* v. *Biddle,* 177 F.2d 579 (2nd Cir., 1950).

Indeed, 42 U.S.C. 2943 provides that for purposes of Title 5 of the U.S.C. (which deals with the political activities of civil service employees), *any* Community Action Agency, including agencies organized as not-for-profit corporations, shall be deemed to be a state or local agency. Yet, the Court of Appeals for Montgomery County, Ohio held that because of the fortuitous organization of the Agency as a not-for-profit corporation, the Agency should be denied the same immunity defense which would be available to other Community Action Agencies similarly situated (they could even be in the same county) but organized as part of the state or a political subdivision thereof. This Court should not encourage such an unreasonable and inequitable result.

Community Action Agencies receive their authority directly from the federal government, 42 U.S.C. 2795, and their administration must be in conformity with the appropriate rules and regulations promulgated by OEO. 42 U.S.C. 2796, see, also 45 C.F.R. Section 1060, which deals with the general characteristics of Community Action Programs; 45 C.F.R. Section 1067, which governs the *funding* of Community Action Programs; 45 C.F.R. Section 1068, which relates to Community Action grantee *financial* management; 45 C.F.R. Section 1069, which regulates Commu-

nity Action grantee *personnel management;* 45 C.F.R. Section 1070, which deals with Community Action Program *grantee operations;* and 45 C.F.R. Section 1071, which dictates grantee *property administration.* See, also 42 U.S.C. 2796 (a), which mandates that certain *personnel policies* be formulated, and subsection (b) which provides that the National Director shall provide rules or regulations to supplement subsection (a). All of such regulations are binding on all Community Action Agencies organized under Title 42, regardless of their form. 45 C.F.R. Section 1069.1-1 et seq.

These statutes and regulations have an obvious impact upon the Agency's operations. As indicated by these statutes, regulations, and the transcript of proceedings, the Agency must account and report to OEO in a fashion analogous to a supply sergeant in the Army reporting to his commanding officer:

(a) The Agency's funds come from Region 5 of OEO in Chicago and the Agency must report to that Regional Office on its expenditure of those funds.

(b) The Agency's operations are subject to federal controls. As Melvin Jackson, the Executive Director of the Agency, stated on direct examination:

"We (the Agency) are subject to, first of all, the guidelines of the Economic Opportunity Act, the Office of Economic Opportunity, and a variety of other funding disciplines, including the Health, Education and Welfare Department, Department of Labor, Department of Agriculture and various state, local governments.

Q. Are there federal restrictions as to where you can spend your money?

A. Yes, there are restrictions as to where and for what purpose you can spend the money."

(c) The Agency had to respond to OEO by filing periodic accounting reports and the Agency's records were audited by an independent certified public accounting firm because of government requirements and procedures. OEO not only reviewed the reports and audit materials supplied by the Agency, but it also held the power to disallow expenditures made by the Agency if the expenditures did not fit within OEO paramenters.

This evidence, together with the law regulating the Agency, is clear and convincing proof that the Agency is a governmental instrumentality in substance, if not in form. Its creation, its daily operation, and its future existence hinge upon the will of the federal government. Courts traditionally examine substance, not form and this Court should do so here. As Judge Wisdom stated in his dissenting opinion in *Hines* v. *Cenla Community Action Agency*, 474 F.2d 1052, 1059 (5th Cir., 1973):

> "There is far more federal involvement here than there is in a parking garage or a Hill-Burton Hospital. See, *Burton* v. *Wilmington Parking Authority*, 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45; *Simkins* v. *Cone Mem. Hosp.*, 4th Cir. 1963, 323 F.2d 959. Moreover, *ours is a Court which puts substance above form*, facts above needless fictions, and national interest above all." (Emphasis added)

In summary, the Agency's goals are dictated by federal legislation, 42 U.S.C. 2795, and its officers are responsible for accounting to the federal government for its operations.

ANALYSIS OF CASE LAW

We do not mean to suggest that any agency or organization that receives federal money is a government instrumentality and therefore entitled to a government immunity defense. Rather, we recognize that there is a continuum with organizations receiving some federal financial assistance at one end and with "pure" federal agencies at the other end. It might be impossible in some cases to determine where on such a continuum a given organization might fall. But where the financial support and the organizational controls are as pervasive as they are here, the governmental immunity defense must be available to the Agency. The same technique used in the Civil Rights area (see, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722) in determining the existence or not of state action under the 14th Amendment, should be used here. Given the dominion and control which the government possesses over Community Action Agencies, the functions which Community Action Agencies serve, and the fact that the Agency's organizational form is the *only* factor precluding the application of the governmental immunity defense here, the immunity defense must be recognized.

In the recent case of *Orleans* v. *United States, supra,* which is now pending decision of this Court (*United States of America* v. *Joseph V. Orleans, supra*), the Sixth Circuit considered whether the Plaintiff could sue a Community Action Agency for personal injuries under the Federal Tort Claims Act. The Community Action Agency in question was an Ohio corporation, not-for-profit, just as Petitioner is in this case. The Sixth Circuit held that the Plaintiff, as a beneficiary of the anti-poverty program, could sue the United States under the Federal Tort Claims Act. In arriving at its decision, the Sixth Circuit recognized Judge

Wisdom's insight in *Hines* v. *Cenla Community Action Agency, supra,* and adopted his rationale in its decision. Community Action Agencies, as grantees of OEO which are subject to OEO control, have been delegated the federal task of combating a war against poverty.

> "Cenla (a Community Action Agency) was organized for the purpose of qualifying as a grantee Community Action Agency of the OEO under 42, U.S.C. Section 2781. Congress adopted the Equal Opportunity Act to combat poverty, to create jobs, to disperse money for the reduction or elimination of poverty, all on a national scale. To insure federal supervision and uniformity, OEO divided the country into regions and adopted guidelines. Cenla, for example, is directly responsible to Region VI of OEO in Dallas, Texas. It must comply with the guidelines and policies formulated by Region VI in Dallas. In event of any conflict between the policies and practices of Cenla as with those of Region VI or federal legislation (as interpreted by OEO), Cenla must yield." *Hines* v. *Cenla Community Action Agency, supra,* 204.

The Sixth Circuit went on to hold on page 204 that Community Action Agencies were federal instrumentalities; the Court used the following reasoning:

> "Congress could have chosen to administer the Economic Opportunity Act directly by establishing local offices of OEO. The declared reason for using local agencies is to assure the maximum participation of the citizens most affected by the program in each community, to the end that the particular needs of each participating community will be discovered and dealt with. Thus, a national priority in programs is forbidden. Nevertheless, OEO approval is required for each local program and all the operations of Community Action Agencies must fit within the detailed framework ordained by OEO . . . The United States cannot avoid liability under the Federal Tort Claims Act on the ground that agencies chosen to achieve the purposes of the 1964 Act are not federal agencies or instrumentalities. To equate the status of such an agency with that of independent contractor under these circumstances would be to elevate form above substance."

Suffice it to say, if an Ohio Community Action Agency is considered an instrumentality of the federal government for purposes of the Federal Tort Claims Act, then such an Agency would certainly be immune from a tort claim filed in the Montgomery County Common Pleas Court.

The *Orleans* decision was presented to the trial court, the Court of Appeals, and the Ohio Supreme Court. Yet, the Court of Appeals for Montgomery County, Ohio did not even *mention* or attempt to distinguish the *Orleans* case from this case! The *Orleans* case was an *Ohio* case, involving an identical issue (i.e., a tort suit filed because of the delict of a community action agency). How the holding in the *Orleans* case could be totally *ignored* by the Court of Appeals is beyond our comprehension. By its silence, the Court of Appeals has declined to follow *Orleans*. Since the Supreme Court of the State of Ohio refused to certify the case, and in effect affirmed the Court of Appeals' decision, the law in Ohio on this important federal question is now in conflict. However, from an analysis of the case law, and the facts involved herein, the Montgomery County Community Action Agency is an instrumentality of the federal government. As such, it would be immune from suits sounding in tort.

B. STATE COURTS DO NOT HAVE SUBJECT MATTER JURISDICTION OVER TORT SUITS FILED AGAINST THE UNITED STATES OF AMERICA OR INSTRUMENTALITIES THEREOF.

In 1946, the United States waived its immunity from liability in tort, and provided for litigation of tort claims against it *in federal courts* by the Federal Tort Claims Act (28 U.S.C. 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680). As an instrumentality of the United States, Petitioner cannot be sued in tort in a state court, for the exclusive forum is the United States District Court. As an ancillary note, the Federal Tort Claims Act does not extend to suits filed in libel and slander, 28 U.S.C. 2680 (h) and such suits would still be barred by the doctrine of governmental immunity, under *Barr* v. *Matteo,* 360 U.S. 564 (1959). Thus, the Common Pleas Court of Montgomery County, Ohio does not have jurisdiction over claims brought under the Federal Tort Claims Act.

The subject matter jurisdiction issue was not raised at the Common Pleas Court or Court of Appeals level, because the issue was so closely related to the sovereign immunity defense. However, subject matter jurisdiction can never be waived by the parties, and the issue can always be raised on appeal.

Since the Sixth Circuit held that community action agencies were instrumentalities of the United States of America, and the United States could be sued under the F.T.C.A. for torts committed by community action agencies, the Plaintiff's proper forum is the United States District Court (*Orleans* v. *United States,* 509 F.2d 197 (6th Cir., 1975)). Thus, the Common Pleas Court of Montgomery County, Ohio did not have subject matter jurisdiction over Plaintiff's tort claim.

VII. CONCLUSION

In conclusion, a writ of certiorari should be granted for the following reasons:

(a) If left standing, Power's libel and slander verdict will be paid from the coffers of the United States government through its funding to the Agency. Had Powers brought suit under the F.T.C.A., his claim would have been denied, under 28 U.S.C. 2680 (h), and *Barr* v. *Matteo, supra.* Thus, Powers will be getting through the back door what he could not attain through the front.

(b) Certiorari was granted in *United States* v. *Orleans, supra.* That case involves a tort claim filed against a federally funded community action agency, another Ohio not-for-profit corporation. The principles in *Orleans* are the same principles which are at issue in this petition. In many respects, this case is a companion to *Orleans.* Obviously, the disposition in *Orleans* will control the disposition of this case. If this Court upholds the Sixth Circuit's decision in *Orleans,* then certiorari should be granted; the Ohio Supreme Court will be in error for failing to recognize the Agency as an instrumentality of the United States government.

We respectfully request that a writ of certiorari be granted.

Respectfully submitted,

James H. Beauchamp and
Irvin G. Bieser, Jr.

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Counsel for Petitioner

APPENDIX

A. ORDER OF THE SUPREME COURT OF THE STATE OF OHIO

(Filed March 5, 1976)

THE SUPREME COURT OF THE STATE OF OHIO
1976 TERM

No. 75-1214

THE STATE OF OHIO)
)
CITY OF COLUMBUS)

JAMES W. POWERS,
Appellee,

vs.

MONTGOMERY COUNTY COMMUNITY ACTION AGENCY,
Appellant.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR MONTGOMERY COUNTY TO CERTIFY ITS RECORD

(Filed March 5, 1976)

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00 paid by Bieser, Greer & Landis.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this 23rd day of March, 1976.

/s/ THOMAS L. STARTZMAN
Clerk

/s/ SAM F. ADKINS
Deputy

B. JUDGMENT ENTRY OF THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

(Filed November 7, 1975)

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

Case No. 4799

JAMES W. POWERS,
Plaintiff-Appellee,

vs.

MONTGOMERY COUNTY COMMUNITY ACTION AGENCY,
Defendant-Appellant.

JUDGMENT ENTRY

(Filed November 7, 1975)

This cause came before the Court on the errors assigned by Defendant-Appellant and the Briefs and arguments of the parties.

Pursuant to the Opinion rendered by this Court on the

1st day of November, 1975, the Judgment of the Common Pleas Court is hereby AFFIRMED.

APPROVED:

/s/ JOSEPH D. KERNS
Presiding Judge

/s/ PAUL SHERER
Judge

/s/ ROBERT L. McBRIDE
Judge

/s/ NEIL F. FREUND
Neil F. Freund
YOUNG & ALEXANDER
Attorney for Plaintiff-Appellee

/s/ JAMES H. BEAUCHAMP
James H. Beauchamp
BIESER, GREER & LANDIS
Attorney for Defendant-Appellant

C. OPINION OF THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

(Filed November 1, 1975)

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

Case No. 4799

JAMES W. POWERS,
Plaintiff-Appellee,

vs.

MONTGOMERY COUNTY COMMUNITY ACTION AGENCY,
Defendant-Appellant.

OPINION

Rendered on the 1st day of November, 1975.

James H. Beauchamp and David C. Greer, Attorneys at Law, 8 North Main Street, Dayton, Ohio 45402
Attorneys for Defendant-Appellant

Neil F. Freund, Attorney at Law, 367 West Second Street, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

KERNS, P. J.

On June 28, 1974, the plaintiff, James W. Powers, commenced this action in the Court of Common Pleas of Montgomery County claiming money damages from the defendant, Montgomery County Community Action Agency. The Complaint was based upon three separate claims for relief, (1) breach of contract, (2) false and fraudulent representations, and (3) libel and slander. The cause came on for hearing before a jury on January 13, 1975, and at the close of all the evidence, the trial court sustained a motion for a directed verdict as to the second claim set forth in the complaint. The first and third claims were submitted to the jury, and on January 17, 1975, the jury returned a $5000.00 verdict upon the first claim and a $15,000.00 verdict upon the third claim. From the judgment thereupon entered in the trial court, the Montgomery County Community Action Agency has appealed to this court.

The defendant Agency is an Ohio corporation, which was organized and exists as a non-profit corporation pursuant to Chapter 1702 of the Ohio Revised Code. Its purpose is to carry out a war against poverty. For example, it provides legal services to low-income families. It assists in child-development programs and provides housing and welfare services. It conducts a senior citizens nutrition program and a veterans program. It is also involved in services revolving around credit unions and consumer affairs. Generally, it may be said that the local agencies are set up to provide multiple services to impoverished communities.

The Agency stems from the Economic Opportunity Act of 1964, and under the terms of the Act, eighty percent of the Agency's budget comes from the federal government. The expenditure of these funds is subject to guidelines and restrictions of the Office of Economic Opportunity,

which requires that an independent audit be made of the financial records of the Agency.

Prior to the commencement of this action, the fiscal department of the Montgomery County Community Action Agency had four employees, including its Controller, James W. Powers, appellee herein. Powers was subject to the control of Melvin Jackson, the Executive Director of the Agency.

Powers was hired by the Community Action Agency on October 4, 1973 and his employment was terminated on March 27, 1974. After Powers was fired by Jackson, a number of newspaper articles were printed in the Dayton Daily News and the Dayton Journal Herald wherein Powers claimed that he was being made a "scapegoat" for a critical audit of the Agency's financial records. At about the same time, Jackson was quoted as saying that Powers was "incompetent" or "incompetent in his job".

In the present appeal, the appellant claims, for its first assignment of error, that the Montgomery County Community Action Agency is an instrumentality of the federal government and thus immune from the tort liability asserted in the plaintiff's third claim. The same issue was pursued in the trial court in a summary judgment proceeding, but the motion for summary judgment on the ground of governmental immunity was overruled.

With reference to this issue, it is significant, although not altogether controlling, that the Agency has a local origin and may sue and be sued. Section 1702.12, Revised Code, Furthermore, it is significant, though again not altogether controlling, that federal funding, with its restrictions and conditions, is not alone sufficient to change the character of a private non-profit corporation. See, *Robles* v. *El Paso Community Action Agency*, 456 F.2d 189.

In the present case, the Agency served as a conduit for federal funds. In fact, its conception and viability was dependent upon federal action. But aside from conditional funding, the federal government had no supervisory control of Jackson or any direct control over Agency activities. The Agency voluntarily established its own identity as a private non-profit corporation, and as such, it was a private employer. See, *Hines* v. *Cenla Community Action Committee, Inc.*, 474 F.2d 1052.

We have examined the authorities submitted by the appellant and the appellee. The cases provide hints and suggestions as to the actual status of Jackson, but none of the cases reach the question presented herein.

In our opinion, the Agency, of its own choosing is a private employer, and it cannot change its statutory identity for the sole purpose of avoiding liability under the doctrine of sovereign immunity. For good and perhaps obvious reasons, federal funding is not alone sufficient to insure sovereign immunity, and the first assignment of error is overruled.

The second assignment of error is directed to the overruling of motions for judgment notwithstanding the verdict and for a new trial as to the first claim asserted in the complaint.

Such motions are subject to the same standard, and the question presented by both was whether reasonable minds could come to more than one conclusion upon the evidence. Neither motion involved either the credibility of the witnesses or the weight of the evidence.

In applying these fundamental principles to the record in this case, this court may not intervene. There was sufficient credible evidence, if believed by the jury, to sustain the verdict, and the second assignment of error is overruled.

The third assignment of error relates to the admission of evidence of "questioned expenditures" which were made prior to Powers' tenure as Controller of the Agency. However, it was the position of the plaintiff during the trial that he was being used as a "scapegoat" for prior irregularities and that one of the principal reasons for his dismissal was because he would not cover up expenditures made prior to his tenure. Under such circumstances, the evidence was pertinent to the issues in the case and was necessary to show the conditions existing at the time of the dismissal. We find no merit in this alleged error.

The fourth assignment of error is based upon the admission by the trial court of testimony by the plaintiff regarding his indebtedness. This testimony does have some bearing upon the issue of damages, and the extent of such testimony was a matter within the discretion of the trial court. Although it may reasonably be debated whether the appeal of such evidence to the sympathies of the jury outweighed its evidentiary value, we cannot say that the trial court abused its discretion as that term is defined in law. The fourth assignment of error is overruled.

The fifth assignment of error questions the admissibility of newspaper articles which were published at or about the time of Powers' dismissal as Controller. In support of this alleged error, the appellant alludes to the general rule that newspaper articles are not admissible to prove the facts stated therein. See, 55 A.L.R. 3d 673. Here, however, the articles were not introduced to prove the truth of the matters asserted therein, but as stated by the trial court, they were introduced for the purpose of demonstrating the defamatory remarks and to show that as a natural consequence of the remarks to news reporters, the statements were published and republished over a period of time. Furthermore, the trial court admonished the jury on three

separate occasions of the limited purpose for which the evidence was to be considered.

It has been held that the admission of an entire newspaper is not necessarily prejudicial error in a libel action. *Spencer* v. *News Pub. Co.*, 79 Ohio App. 519. Compare, *Heyman* v. *City of Bellevue*, 91 Ohio App. 321.

In the present case, the newspaper articles were relevant to the issues and were introduced for a legitimate purpose. The articles are attended by some objectionable material, but the opinions and hearsay reflected therein are substantially diluted by other evidence which was already known and properly before the jury for its consideration. Under such circumstances, we are of the opinion that the form of this evidence, as admitted by the trial court, had no material effect upon the outcome of the case. The fifth assignment of error is overruled.

The evidence in this case arouses curiosity as to other legal matters, but our scope of inquiry has been limited to the five assignments of error set forth by the appellant. We find none of the alleged errors well made, and the judgment of the Court of Common Pleas will be affirmed.

SHERER and McBRIDE, JJ. concur.

D. JUDGMENT ENTRY OF THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

(Filed January 27, 1975)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

CASE No. 74-1418

(Judge Ferguson)

JAMES W. POWERS,

Plaintiff,

vs.

MONTGOMERY COUNTY COMMUNITY
ACTION AGENCY,

Defendant.

JUDGMENT ENTRY

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict as to the first and third claims of Plaintiff's Amended Complaint;

IT IS ORDERED AND ADJUDGED that Plaintiff, JAMES W. POWERS, recover of the Defendant, MONTGOMERY COUNTY COMMUNITY ACTION AGENCY, the sum of Five Thousand ($5,000.00) Dollars on the first claim of Plaintiff's Amended Complaint; plus interest.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff, JAMES W. POWERS, recover of the Defendant, MONTGOMERY COUNTY COMMUNITY ACTION AGENCY, the sum of Fifteen Thousand ($15,000.00) Dollars on the third claim of Plaintiff's Amended Complaint; plus interest.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff, JAMES W. POWERS, recover from the Defendant, MONTGOMERY COUNTY COMMUNITY ACTION AGENCY, his costs of action.

IT IS FURTHER ORDERED as to the second claim of Plaintiff's Amended Complaint, and upon Defendant's Motion for a Directed Verdict made at the close of all of the evidence as to said claim, that Defendant's Motion be sustained and that Plaintiff's second claim be dismissed on the merits and the Plaintiff take nothing as to such claim.

APPROVED:

/s/ DONALD L. ZIEGEL
Judge

/s/ NEIL F. FREUND
Young & Alexander
Attorney for Plaintiff

/s/ JAMES H. BEAUCHAMP
Bieser, Greer & Landis
Attorney for Defendant

E. ORDER OF THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

(Filed January 9, 1975)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

CASE No. 74-1418

ORDER

FERGUSON, J.

This matter came on upon the motion of the defendant for summary judgment, plaintiff having granted defendant leave to file the motion even though the matter was set for trial.

The court finds that the motion for summary judgment is not well taken, and that defendant is not entitled to the defense of governmental immunity.

This order was served by the court on counsel named below, by regular mail, this 9th July (sic), 1975.

/s/ DOUGLAS K. FERGUSON
Judge

JAMES H. BEAUCHAMP:
NEIL F. FREUND and STEPHEN V. FREEZE